

# Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance

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## Introduction

Irish Constitutional law recognises the horizontal operation of constitutional rights. The doctrine of horizontality refers to the application of constitutional rights to private relationships. Constitutional rights can be applied to private relationships either directly or indirectly. Nonetheless, dissatisfaction has been expressed over developments (or lack of developments) in this area of law in Ireland for a variety of reasons. This article will focus on dissatisfaction raised on the basis of a pronouncement on horizontality made by the Irish judiciary in *Hanrahan v Merck Sharp & Dohme (Ireland) Limited (Hanrahan)*.<sup>1</sup>

An assessment of the dissatisfaction coupled with a re-examination of past judicial pronouncements on the horizontal application of constitutional rights reveals two problems. First, scholars have implied that Irish courts have sought to abandon or suspend direct horizontality and simultaneously have asked litigants to establish a high threshold of qualification before they will intervene. An alternative reading of the status quo will be argued for. Secondly, there appears to be a conflation of direct and indirect horizontality. It will be contended that both court pronouncements and academic commentary have contributed to such conflation, and moreover, have made the distinction between them unnecessarily subtle. Ultimately, it will be shown that the judiciary in Ireland does acknowledge both direct and indirect horizontality as distinct strands and that this understanding conforms to international practice.

Significantly, it appears that the doctrine of horizontality has not matured and retains the status of a neglected but gifted child with huge potential seeking to be released. The so-called lack of maturity has not been subjected to any comprehensive examination whether empirical, analytical or otherwise. Although the “lack of

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<sup>1</sup> [1988] ILRM 629 (SC). Scholars who have expressed dissatisfaction, and on whose views this article focuses in that regard, include B. McMahon and W. Binchy, *Law of Tort*, (3<sup>rd</sup> ed, Butterworths, 2000); William Binchy, Constitutional Remedies and the Law of Torts, in James O'Reilly ed, *Human Rights and Constitutional Law*, (Round Hall, 1992), 201; Colm O'Cinneide, Irish Constitutional Law and Direct Horizontal Effect - A Successful Experiment? 213, in D. Oliver and J. Fedtke eds, *Human Rights in the Private Sphere: A Comparative Study*, (Routledge-Cavendish, 2007) & Colm O'Cinneide, Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights, (2003) 4 *Hibernian Law Journal*, 77

maturity” may mean different things to different individuals this paper views the lack of maturity as referring to the apparent lack of a clear normative basis; the apparent lack of deep judicial elaboration; the relative lack of case law on the subject and the relatively mild scholarly interest in the subject. Consequently, this article assumes that the re-examination of past judicial statements and the assessment of commentary by scholars provides a context (among many possible others) for future and more focused examination and understanding of the apparent lack of maturity.

A further assumption is that the jurisprudence of horizontality in Ireland requires deep reflection on the approaches to horizontality potentially available and the circumstances of their invocation. A desired product of such reflection is the identification of a clear normative basis and the scope of horizontality. Accordingly, the re-examination of judicial pronouncements and the assessments of academic commentaries on the meaning of horizontality in the Irish legal system provide an entry point towards the identification of such a normative framework and the scope of horizontality. The article aims to suggest that the maturity of horizontality in Ireland is in part impeded by lack of clarity in academic commentary and judicial pronouncements on the options and scope open to litigants under the doctrine of horizontality.

The article will begin by defining and distinguishing direct from indirect horizontality in line with conventional international understanding. Secondly, the article will discuss the constitutional duty of the state to discharge its constitutional obligations on the basis that the continuing relevance of horizontality is largely dependent on the recognition of the state’s obligation. Thereafter, the article will highlight views that suggest horizontality is in an unsatisfactory state. The article will then examine the Irish judiciary’s pronouncements and scholarly commentary on horizontality in the light of the identified problems. Ultimately, the article will tentatively suggest that the route towards the attainment of an analytical or normative framework for horizontality lies in opening up to developments in other jurisdictions.

### *The Doctrine of Horizontality: Towards a Definition*

In this part an attempt will be made to define and to distinguish direct from indirect horizontality in line with conventional international understanding.

International practice informs that horizontality can be classified as direct or indirect.<sup>2</sup>

Under direct horizontality an individual is able to plead before the courts that fundamental constitutional rights be applied directly to a private relationship.<sup>3</sup> Peter Benson defines direct horizontality as a situation where constitutional rights

... just as they are defined ... are to be applied directly ... to relations between private individuals. The definition and vindication of these rights are fully independent of the doctrines and operation of private law.<sup>4</sup>

Johan van der Walt demonstrates the operation of direct horizontality by posing a question:

What if a claimant was unable to find a cause of action in terms of the existing law of delict [read tort]? ... The question would be this: can such a claimant then raise a fundamental right directly as a cause of action, or must he or she simply accept... that this is simply one of those purely social violations of fundamental rights that does not concern the law and therefore is not covered by the Bill of Rights?<sup>5</sup>

Indirect horizontality occurs when a fundamental constitutional right attaches to a different right or obligation found in the common law.<sup>6</sup> Similarly Peter Benson explains that indirect horizontality is the application of constitutional rights to transactions between private individuals “channeled through the doctrines, methodology and procedures of private law.”<sup>7</sup> Johan van der Walt summarises the operation of indirect horizontality described in the South African case of *Du Plessis v De Klerk*<sup>8</sup> as follows:

Private disputes could only be taken to court on causes of action or grounds of defence already contained in private law. Once this had been done, the parties could expect the courts not to apply such principles or rules in a manner that would be inconsistent with the constitution. Indeed they could rely on the court to develop and transform existing law to ensure that it accorded with the principles and values embodied in the Bill of Rights.<sup>9</sup>

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<sup>2</sup> See Katja S. Zeigler (ed.) *Human Rights and Private Law: Privacy as Autonomy*, (Hart, 2007) and D. Oliver and J. Fedtke (eds.) note 1.

<sup>3</sup> Alison L. Young, Horizontality and the Human Rights Act 1998, in Katja S. Zeigler (ed.) *ibid*, 35, 38.

<sup>4</sup> Peter Benson, Equality of Opportunity and Private Law, in D. Friedman & D. Barak-Erez (eds.) *Human Rights in Private Law*, (Hart, 2001) 201, 205

<sup>5</sup> Johan van der Walt, Progressive Indirect Application of the Bill of Rights: Towards A Co-operative Relation Between Common-Law and Constitutional Jurisprudence, 2001, 17 *SAJHR*, 341, 352.

<sup>6</sup> Alison L. Young, note 3, 35, 39.

<sup>7</sup> Benson, note 4, 201, 205

<sup>8</sup> [1996] (3) SA 850 (CC)

<sup>9</sup> Johan van der Walt, note 5, 345

In both *Meskeil v C.I.E (Meskeil)* and *Murtagh Properties Ltd v Cleary (Murtagh)* constitutional rights were defined and applied directly to regulate what were private relationships.<sup>10</sup> The rationale was that there were no statutory or common law remedies available to plaintiffs. In *Meskeil* the Supreme Court identified from the right to join the trade union the right not to join a trade union and enforced this against the defendant company. In *Murtagh* the court identified and enforced the right to earn a livelihood without discrimination on the basis of sex. In the cases of *Hanrahan* and *Philip Hosford v John Murphy and Sons Ltd (Philip Hosford)*<sup>11</sup> the plaintiffs unsuccessfully asked the courts “to develop” the common law so that it conformed to the requirements of the relevant constitutional rights.

Before the article proceeds to discuss the constitutional duty of the state to discharge its constitutional obligations it must be pointed out that the judiciary in Ireland have developed an approach to horizontality referred to as the constitutional tort. It is not clear whether the term “constitutional tort” is one of legal or judicial art and thereby carrying with it a specific meaning, scope and limitations. In this paper it will be assumed that it is equivalent to and incorporates both direct and indirect horizontality.

### *Fundamental Constitutional Rights, the State and the Concept of the State’s Duty to Discharge Obligations*

In this section and on account of its relevance to the doctrine of horizontality a discussion of the doctrine of the constitutional duty of the state to discharge its obligations will be made. A point will be made that the acknowledgement of the existence of a judicial space for the implementation of constitutional rights under the doctrine of the state’s obligation to discharge constitutional rights is a *sine qua non* for the operation of the doctrine of horizontality. Under the constitutional law of Ireland the “state” has a duty to discharge its obligations which may arise under a particular constitutional right. The term “state” is understood here expansively to include the executive, the legislature, the judiciary and the agents of the state.<sup>12</sup> This duty it appears is implied from Article 34 of the Constitution. Hogan and Whyte remark that

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<sup>10</sup> [1973] IR 121 and [1972] IR 330

<sup>11</sup> [1988] ILRM 300 (HC)

<sup>12</sup> Articles 40 to 44. Gerard Hogan and Gerard Whyte, *Kelly: The Irish Constitution*, (3<sup>rd</sup> ed, Butterworths, 1994), 698-711.

Thus, the High Court and, on appeal, the Supreme Court have exclusive jurisdiction to determine whether laws are valid or invalid on the ground that they are in conflict with any provision of the Constitution. The most significant provisions in this respect are those which recognise basic or fundamental rights...<sup>13</sup>

The discharge of obligations by the state implies that, in cases, the state ought to protect, enforce and vindicate a constitutional right conferred or a constitutional duty owed to an individual. The concept of a duty imposed on the state to discharge its constitutional obligations has pedigree and in a line of cases Irish Courts have attempted to clarify the nature of this obligation.

The constitutional duty was first explained in *Byrne v Ireland (Byrne)*; where it was argued on behalf of the State that the plaintiff was not able to successfully prosecute an action for damages against the State in tort because the State was immune from such action on the basis of the doctrine of state sovereignty. In rejecting this proposition Walsh J made some observations at several points in his judgement on the nature of the State's constitutional obligation which, it is argued, are relevant to horizontality.<sup>14</sup> The views of Walsh J are effectively summarised in the following passage:

There are several instances in the Constitution of Ireland also where the State undertakes obligations towards citizens. It is not the case that these are justiciable only when some law is being passed which directly infringes those rights or when some law is passed to implement them. *They are justiciable when there has been a failure on the part of the state to discharge the obligations or to perform the duties laid upon the state by the constitution.*<sup>15</sup>

Read together the observations of Walsh J may be construed as reinforcing the view that failure to pass a statute or to develop the common law or to take necessary action that prevents infringement or a threat of infringement of an identified constitutional right will suggest breach of obligation on the part of the state and such failure potentially may, in appropriate cases, be met by either court censure or court redress. In order to make sense of the views expressed by Walsh J in relation to the

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<sup>13</sup> Gerard Hogan and Gerard Whyte, *Kelly: The Irish Constitution*, (4<sup>th</sup> ed, Butterworths, 2003), para. 15.59.

<sup>14</sup> [1972] IR 241 (SC), 264, 281.

<sup>15</sup> *Ibid*, 280 [Emphasis added].

doctrine of horizontality it is necessary to elaborate further the nature of the obligation that the judiciary has as a constituent arm of the state.<sup>16</sup>

Before this is done it is also necessary to address an argument that *Byrne* has been overtaken by jurisprudence on the separation of powers which severely restricts the power of an organ of state from encroaching on an area of competence of another organ of state. In *Boland v An Taoiseach* Fitzgerald CJ stated affirmed the capacity of courts to review executive action where there was “a clear disregard by the Government of the powers and duties conferred upon it by the Constitution.”<sup>17</sup>

A contemporary touchstone for the doctrine of separation of powers is provided by the Supreme Court cases of *Sinnott v Minister for Education*<sup>18</sup> (*Sinnott*) and *T.D. v Minister for Education*<sup>19</sup> (*T.D.*). Oran Doyle notes that in both cases the question “whether the courts had the power to grant a mandatory order to enforce constitutional rights” was answered in the negative.<sup>20</sup> In summarising the majority opinion in *T.D.* Doyle states that:

Each organ of government exercises its own type of powers and only interacts with other organs of government where it has explicit authorisation from the Constitution to do so. The courts have a power to review how the other organs of government exercise their powers; the courts have no power to exercise those other powers themselves. *It follows from this that a mandatory order which determines policy for the executive branch is illegitimate.*<sup>21</sup>

On this account, it is submitted that the cases of *Sinnott* and *T.D.* are not directly relevant to the doctrine of horizontality. These cases do not give clarification whether and in what way the doctrine of separation of powers impacts on the doctrine of horizontality. The specific separation of powers issue dealt with in *Sinnott* and *T.D.* focused on the power of courts to compel the executive to take action whereas the doctrine of horizontality focuses in the ability of the court to regulate private actions through the direct application of a constitutional right or through the modification of private law. In assessing whether courts under the guise of the doctrine of horizontality are encroaching on the legislature’s area of competence in a given

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<sup>16</sup> It is also important to recall the description of direct and indirect horizontality and also view or assume that the judiciary is included in the notion of the “state”.

<sup>17</sup> [1974] IR 338, 362.

<sup>18</sup> [2001] 2 IR 545

<sup>19</sup> [2000] 4 IR 259

<sup>20</sup> Oran Doyle, *Constitutional Law: Text, Cases and Materials*, (Clarus Press, 2008), 363, paragraph 13-19.

<sup>21</sup> *Ibid*, 367, paragraph 13-31 [Emphasis added]

context it is necessary to determine which organ of state has the duty to ensure that deficiencies in the common law or statute law which regulate private life are rectified. Furthermore, the conception of horizontality advanced in this article is consistent with the established constitutional position that courts “have a negative power to declare a (*statute*) law invalid but do not have the power to declare what might be enacted to replace the invalid (*statute*) law”.<sup>22</sup> Furthermore, Hogan and Whyte have stated that “by contrast with constitutional cases involving legislation *Byrne* involved the creation of constitutional judge-made principles regulating this area in a positive manner”.<sup>23</sup>

Consequently, in the light of the separation of powers argument, the observations made by Walsh J in *Byrne* ought to be placed in an idealistic position of the perfect political community. This is essentially a position that some classical and modern liberal theories of law and state would also take and it carries along with it a set of basic assumptions.<sup>24</sup> In a perfect situation (as distinct from a lawless chaotic state of nature) a political community, through a law making body, would have presciently developed appropriate legal regimes to respond to any potential constitutional rights infringing scenario. Such regimes are instantiated in legislation and the common law. Reality borne out of experience informs us that political communities are ineluctably fallible and incapable of producing a *corpus* of perfect anticipatory laws. In the event of legislative or common law failure courts are therefore entitled in appropriate circumstances to address lacunae in the imperfect body of law.<sup>25</sup> Courts are saddled with the obligation to ensure that an identified constitutional right infringing scenario is addressed and this scenario may exist in relationships either between the state and the individual or between individuals.

*Byrne* is a case which involved the constitutionality of a common law rule (or to be precise a public common law rule) rather than legislation. *Byrne* is also a case where a constitutional right guaranteed by the state was in fact infringed by the state; the state failed to facilitate a citizen’s right to sue the state in its private capacity.

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<sup>22</sup> Gerard Hogan and Gerard Whyte, *Kelly: The Irish Constitution*, (4<sup>th</sup> ed, Butterworths, 2003) para. 15.76. [Emphasis added].

<sup>23</sup> *Ibid*, paragraph 15.80

<sup>24</sup> See J.G. Riddall, *Jurisprudence*, (OUP, 1999) chapter 18 on Liberalism. The analytical positivism of Hans Kelsen & H.L.A. Hart; Lon Fuller’s procedural natural law and the theory of interpretation of Ronald Dworkin have a common feature in that they make the assumption that judges have discretion that allows them to address hard cases although they differ on the judge’s source of authority to do so.

<sup>25</sup> See Denise Meyerson, *Understanding Jurisprudence*, (Routledge–Cavendish, 2007), especially 63–67, where she explains H.L.A. Hart’s view of indeterminacy of law.

Since this article focuses on private relationships a question may be raised whether the duty of the state (specifically the judiciary) to discharge its obligations equally applies in a dispute between private individuals. An argument that captures the obligation of the court envisaged here (reflected by Walsh J in *Byrne*) in the context of a private relationship was advanced in *Philip Hosford*. Costello J observed

Whilst at common law a claim for an award of damages for the harm it is alleged the plaintiffs sustained does not lie, this is not the case if the harm resulted from an infringement of constitutionally protected rights. If the defendants' careless act amounted to a constitutional wrong which inflicted harm on the plaintiffs then I think damages are in principle recoverable; otherwise, the protective provisions of the Constitution would be vacuous and valueless. If therefore the plaintiffs can establish that the defendants were guilty of a breach of a constitutionally imposed duty which inflicted harm on the plaintiffs then damages are recoverable even though at common law an award in respect of such harm could not be made.<sup>26</sup>

The plaintiffs in *Philip Hosford* unsuccessfully sought to recover damages in negligence on the basis of an argument that the negligent acts of the defendant (a private entity) had caused the death of their father and as a consequence they had been permanently deprived of a moral, intellectual, religious and educational nature in breach of Article 41. The plaintiffs also made the alternative argument that the court as an arm of the state had a constitutional obligation to develop a common law rule in the tort law of negligence on the basis of a constitutional value. Costello J rejected the plaintiff's Article 41 argument in the following terms

It follows that the rights which are conferred by *Article 41(1)(2)* are (a) the right to protection from legislation which attacks or impairs the constitution or the authority of the Family and (b) the right to protection from the *deliberate* act of State officials which attack (sic) or impair (sic) the constitution or authority of the Family. It would also follow that a private person whose *negligent* act had so seriously injured the head of a Family that the constitution of the family unit was fatally impaired had not thereby infringed any constitutional right enjoyed by members of the affected Family under either paragraph of *Article 41(1)*.<sup>27</sup>

The constitutional obligation of the court in a private relationship context was also invoked in the case of *Hanrahan*. The plaintiffs alleged an infringement of a constitutional right by, ostensibly, a private common law rule. Similarly, the

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<sup>26</sup> Note 11, 303

<sup>27</sup> *Ibid*, 305. As regards enacted law failure here would mean direct infringement, inadequacy or lack of coverage.



discussion by the Supreme Court potentially has importance for the debate about a court's ability to intervene in private relationships on the basis of an apparent constitutional state obligation. Nonetheless, some observations which Henchy J made in the case have raised uncertainties which potentially may weaken the argument for a robust jurisprudence on horizontality. In *Hanrahan* Henchy J explained that "the implementation of those constitutional rights is primarily a matter for the State".<sup>28</sup> McMahon and Binchy suggest Henchy J was signalling that the judiciary does recognise that the legislature essentially has a prior claim to the issue of the implementation of constitutional rights.<sup>29</sup> They observe in Henchy J "a striking reluctance to involve the courts in the role of refashioning tort law, 'root and branch', in the light of the Constitution".<sup>30</sup>

Taken together the observations by McMahon and Binchy are open to two possible and different interpretations. On the one hand, that the signal given and the unwillingness shown by Henchy J to "re-organise" tort law "root and branch" was due to deference to the legislature's prior claim. On the other hand, – although the courts are entitled to defer to the legislature in some cases and in the light of the remarks made by Henchy J in the particular instance of *Hanrahan* – it was the specific combination of facts and legal issues that arose in the case persuaded Henchy J to refrain from "re-organising" tort law in order to vindicate the plaintiff's claim.

In *Hanrahan* the plaintiffs' relied on the tort of nuisance and argued that the factory owned by the defendant had emitted noxious substances, which among other things caused the plaintiffs' ill health. The plaintiffs' contended that to vindicate their Article 40.3 Constitutional rights the court had to shift the burden of proof to the defendant. Although sympathetic to the plaintiffs' difficulties in producing the necessary evidence, Henchy J rejected the plaintiffs' contention primarily on two grounds. First, the plaintiffs' had the option to pursue the action in negligence and ultimately could have availed of the *res ipsa loquitur* rule. Secondly, the reversal of

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<sup>28</sup> Note 1, 636. Gerard Hogan and Gerard Whyte, note 13, para. 7.3.239 observe that in *Hanrahan* the existence of the 'tort of nuisance' could be interpreted to mean the implementation of the state's discharge of its duty. This suggests that the judiciary for the purpose of the constitutional principle considered in this instance is the "state" since one can hardly claim the common law is a product of the legislature.

<sup>29</sup> B. McMahon and W. Binchy, note 1. (This is a speculative view as Henchy J did not expressly adopt this position in his judgment.)

<sup>30</sup> *Ibid*, para 1.19.

the burden of proof at the trial stage would have prejudiced the defendant in the light of the “interrogatories”, “notices for particulars” and the “discovery of documents”.<sup>31</sup>

If the latter interpretation by McMahon and Binchy is the correct understanding of what they wish to communicate then, it is submitted, their interpretation is on its face fair. The plaintiffs had not exhausted the options open to them in order to vindicate their Article 40.3 Constitutional rights.<sup>32</sup> Indeed there is nothing wrong with a view that expects courts to exercise restraint when they deem it appropriate on the basis of either legal principle, normative requirements or the exigencies of public policy in a situation that potentially calls for interference with private law. However, a significant point is that the survival of the doctrine of horizontality depends on adopting a perspective on the doctrine of the state’s obligation which acknowledges the existence of a judicial space for the implementation of constitutional rights.

The use of the phrase “root and branch” perhaps may not be appropriate as a descriptive tool of what the Supreme Court was asked to do in *Hanrahan* since it suggests wholesale change. An analogy can be drawn here between what the court was asked to do in *Hanrahan* on the basis of horizontality with the inherent jurisdiction that courts have to develop or contract the common law when faced with a novel situation, a judicial activity known as the incremental development of the common law. The South African constitutional court judge O’Regan J in *Kern v Minister of Safety and Security*<sup>33</sup> (*Kern CC*) explained the meaning of the incremental development of the common law through the principle of precedent in the following terms

From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule ... firstly a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority. The rule is then not developed but merely applied to facts bound by the rule.

Secondly ... a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of

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<sup>31</sup> **Note 1, page?**

<sup>32</sup> Under s. 8 (2) (a) of the Constitution of the Republic of South Africa Act no 108 of 1996 indirect horizontality can be invoked only where legislation does not give effect to the relevant constitutional right.

<sup>33</sup> Case CCT 52/04 (CC 13 June, 2005) < <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT52-04>>

facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.<sup>34</sup>

As opposed to requesting the Supreme Court to carry out wholesale change the plaintiffs in *Hanrahan* were seeking the alteration of a tort law “rule” on authority of the doctrine of horizontality. Nonetheless, there is the risk that the statement by Henchy J will be construed in accordance with the former interpretation as pointed out by Binchy;<sup>35</sup> that courts have no business dealing with such situations (failure by the legislature to protect or enforce constitutional rights through the modification private law rules) when they do arise. The rationale is that the implementation of constitutional rights, from a competence point of view, is “exclusively” an area for the legislature and the judgment of Barrington J in *McDonnell v Ireland*<sup>36</sup> is often cited for reinforcement.<sup>37</sup> This interpretation and its rationalisation is a variation on the separation of powers argument and ought to be challenged because it misrepresents the views of Barrington J<sup>38</sup> and also has the potential to undermine (and is inconsistent with) the established premise upon which horizontality is built.

The legislature may correctly be assumed to have the primary responsibility for implementing constitutional rights through legislation. The role of courts therefore is, in relation to legislation, limited to ensuring that such legislation does not breach constitutional provisions. The courts may equally be correctly assumed to have the responsibility of elaborating constitutional rights through the development of the common law. Courts can therefore be expected to cast a watchful eye on the common law to ensure that it comports with constitutional provisions. From a perspective of judicial practice orthodoxy it would be strange to expect courts not to undertake such

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<sup>34</sup> Ibid para 16.

<sup>35</sup> William Binchy, 201, 205.

<sup>36</sup> [1998] 1 IR 134, 147 (SC). According to Barrington J “the general problem of resolving how constitutional rights are to be balanced against each other and reconciled with the exigencies of the common good is, in the first instance, a matter for the legislature”.

<sup>37</sup> Colm O’Cinneide, *Irish Constitutional Law and Direct Horizontal Effect & Colm O’Cinneide, Taking Horizontal Effect Seriously & McMahon & Binchy*, note 1.

<sup>38</sup> Note 36, 148 Barrington J further stated ‘If the general law provides an *adequate* cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the Court to devise a new and different cause of action’. This implies judicial willingness to intervene where *inadequacy* is established. [Emphasis added]

a function on the basis of an argument that it is an area of activity preserved for the legislature.

It is submitted that Henchy J commences his analysis from the idealistic position of a perfect political community and that taken literally his statement (on legislative exclusivity) is inconsistent with established judicial practice regarding the role of courts in the modification of private law in the light of constitutional values. It may be argued that the obligation imposed on the courts here is similar to the so called incremental development of the common law since the latter also operates on the basis of assumptions of imperfect law and the inherent common law changing jurisdiction (or obligation) that courts retain. Indeed it would be odd, to say the least, if the development of the common law was strictly viewed as a function of the legislature. The statement by Henchy J must be viewed as steeped in the understanding that modern political communities have of a constitutional state where the division of state responsibilities is fairly well articulated and also where judicial authorities will react accordingly in the event of legislative or common law dysfunction in the light of constitutional requirements. If viewed from this perspective the statement of Henchy J does not put a blanket injunction against the re-organisation of or the interference with private law. It is a statement that is functional in orientation and highlights a nuanced view of this institutional relationship.<sup>39</sup> The statement ought to be viewed as a nuanced perspective on the constitutional duty to discharge its obligations in the light of the relationship between private law and constitutional rights and indeed on what is the proper relationship between the legislature and the judiciary in that respect.<sup>40</sup>

At this juncture it is necessary to point out three features common to, and implicit in the extracts from the Irish judgments highlighted above. First, and in appropriate cases, there is a distinctly clear constitutional duty on the state to ensure, and an individual has a corresponding right to seek, the protection and enforcement of a constitutional right. In the event of state failure through non-implementation of law,

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<sup>39</sup> See David Gwynn Morgan, *A Judgement Too Far? Judicial Activism and The Constitution*, (Cork University Press, 2001), 15-18 where he discusses the law making aspects of judicial functions.

<sup>40</sup> The doctrine of separation of powers conventionally explains this conceptual arrangement of division of responsibility. Other commentators retain a flexible view of separation of powers. See Mark De Blacam, Children, Constitutional Rights and the Separation of Powers, (2002) 37 *Irish Jurist*, 113; David Gwynn Morgan, *ibid* and Gerry Whyte, Discerning the Philosophical premises of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights, 1 *Contemporary Issues in Irish Law*, 216, 225-228.

implementation of infringing or inadequate law, the state may be obliged to ensure, and the individual may be entitled to expect the vindication of a constitutional right. Secondly, the satisfaction of obligations and the exercise of individual rights will not only be invoked in relation to the vertical relationship an individual has with the state but will also arise out of the horizontal relationship private individuals have with each other. Thirdly, the term “state” under the constitution includes the judiciary and that as a general principle it is also expected to vindicate constitutional rights.

### *The Doctrine of Horizontality: A Gifted but Neglected Child?*

Irish courts retain the proud distinction of being an early progenitor in the application of fundamental rights to private relationships. In Ireland the doctrine of horizontality appears to have been first articulated in the cases of *Burke and O'Reilly v Burke and Quail* and *Re Blake*<sup>41</sup>. In both cases, and on the basis that private action breached Article 42 of the Constitution, “directions in wills regarding children’s education and religious upbringing” respectively were declared void.<sup>42</sup> A further early example of horizontal application of constitutional rights is *Educational Co. of Ireland v Fitzpatrick (N0.1) (Educational Co. of Ireland N0.1)*.<sup>43</sup> The High Court granted an interlocutory injunction in favour of the plaintiff company restraining members of the Irish Union of Distributive Workers and Clerks from picketing at the plaintiff’s premises with the intent of compelling employees of the plaintiff to join the Union. On appeal O’ Dalaigh J held

I incline to view that if the employers had attempted to compel their non-union employees to join the union...they would have acted contrary to the Constitution, the state guarantees liberty to exercise...Liberty to exercise a right, it seems to me, prima facie, implies a correlative duty on others to abstain from interfering with the exercise of such right.<sup>44</sup>

On the subsequent full hearing in *Educational Co. of Ireland v Fitzpatrick (N0.2) (Educational Co. of Ireland N0.2)* Budd J stated emphatically

If an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen’s constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the constitution there exists a correlative duty on

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<sup>41</sup> [1951] IR 216 and [1955] IR 69

<sup>42</sup> Michael Forde, *Constitutional Law of Ireland*, Chapter 28, (2<sup>nd</sup> edition, First Law, 2004), 835

<sup>43</sup> [1961] IR 323, (HC)

<sup>44</sup> Ibid, 343 (SC)

the part of other citizens to respect that right and not to interfere with it. To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless. It follows that the Courts will not so act as to permit any body of citizens to deprive another of his constitutional rights.<sup>45</sup>

A decade later the Supreme Court applied fundamental rights to private relations in *Meskeel* and Walsh J held

A right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and ... the constitutional right carried within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.<sup>46</sup>

The horizontal use of fundamental constitutional rights is now an established feature on Ireland's legal landscape and, in a profound sense, it is irreversible. McMahon and Binchy assert that the judicial era between *Educational Co. of Ireland NO. 1* and the late 1980's represents an age when the courts were optimistic and confident about the efficacy of the doctrine of horizontality.<sup>47</sup> A picture is thus drawn of courts that were generally inclined to deal favourably with a litigant who invoked rights guaranteed by the Constitution in a private dispute. Since the late 1980s Supreme and High court judgments have attempted to further elaborate the doctrine of horizontality. However, McMahon and Binchy go on to observe that the gains attained following *Educational Co. of Ireland NO. 1* and *Meskeel* have been reversed. An important judgment that is cited in this regard is the Supreme Court judgment of Henchy J in *Hanrahan*.

The views expressed by McMahon and Binchy suggest that although the doctrine of horizontality is an established phenomenon in Ireland's constitutional law contemporary attempts to invoke it successfully will be rare. Other academics have in the past drawn a picture of a doctrine in its infancy, of missed opportunities and of a hardening judicial attitude towards it. Hogan and Whyte observed that "judicial analysis of the use of the law of tort to protect constitutional rights is as yet at a

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<sup>45</sup> [1961] IR 345, 368 (HC). On appeal the Supreme Court confirmed the views of the High Court.

<sup>46</sup> Ibid, 132-3

<sup>47</sup> McMahon and Binchy, note 1, para 1.60.

somewhat primitive stage”.<sup>48</sup> Siobhan Mullally noted the apparent undeveloped nature of the horizontal equality clause jurisprudence (Article 40.1).<sup>49</sup> Similarly, for Colm O’Cinneide, the case of *Murtagh* represents a missed opportunity in that a tort of interference with livelihood could have been developed.<sup>50</sup>

To date progress on horizontality from academic, judicial and policy perspectives is mixed. Scholarly work on Irish approaches to horizontality in Irish law journals is dated and this perhaps is an indication of the level of interest scholars have on the subject.<sup>51</sup> Furthermore, with the exception of Forde’s text on constitutional law, horizontality has relatively not been accorded significant space in Constitutional law texts.<sup>52</sup> An extended treatment of this important constitutional subject is found in a textbook on Tort law, by McMahon and Binchy.<sup>53</sup> O’Cinneide observes that, as McMahon and Binchy do, in the 1990s Irish courts were cautious in applying constitutional rights in private law whereas Margulies sees Irish courts as generally lacking caution in their use of the doctrine of horizontality.<sup>54</sup> Institutional human rights policy and practice appear to be insulated from practice on horizontality. Due to a deliberate policy decision the legal regime that incorporates into Irish law the European Convention on Human Rights in Ireland, The ECHR Act 2003, ostensibly does not address the horizontality question. Donncha O’Connell suggests “there is clearly a desire to inhibit the development of a horizontal application of the Convention”.<sup>55</sup> Similarly, due to the limitations imposed by the ECHR Act 2003, the strategy document of the Irish Commission on Human Rights does not seem to have a

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<sup>48</sup> Hogan and Whyte, note 12, 708

<sup>49</sup> Siobhan Mullally, Equality Guarantees in Irish Constitutional Law - The Myth of Constitutionalism and the Neutral State, in Tim Murphy and Patrick Twomey (eds) *Ireland’s Evolving Constitution, 1937-97: Collected Essays*, (Hart, 1998), 147. These comments were made in the light of *Carna Foods Limited v Eagle Star Insurance Co. (Ireland) Limited* [1995] 1 IR 526 (HC); [1997] 2 ILRM 499 (SC)

<sup>50</sup> Colm O’Cinneide, Taking Horizontal Effect Seriously, note 1, p. 90

<sup>51</sup> Colm O’Cinneide, Irish Constitutional Law, note 1. To the knowledge of the author, since Martin B. Margulies (2002) Standards of Review and State Action Under the Irish Constitution, (2002), 37 Irish Jurist (N.S.) 23 and Colm O’Cinneide, Taking Horizontal Effect Seriously note 1, work on horizontality has not appeared in Irish journals.

<sup>52</sup> Michael Forde note 42

<sup>53</sup> B. McMahon and W. Binchy, *Law of Tort*, note 1.

<sup>54</sup> Colm O’Cinneide, Irish Constitutional Law, note 1 at p. 236 and Martin B. Margulies note 51, 50-54. Margulies has expressed reservations on the use of constitutional rights horizontality.

<sup>55</sup> Donncha O’Connell, The ECHR Act 2003: A Critical Perspective, in Ursula Kilkelly, *ECHR and Irish Law*, (ed), (Jordan, 2004). A comparison of the Irish Act with the English Human Rights Act 1998 and especially sections 3(1), 6(1), 6(3) (a) and (b) prima facie shows reluctance on the part of the Irish state to commit itself to horizontality.

set agenda on the role of human rights in private law.<sup>56</sup> Given these observations it would seem that O’Cinneide is on firm ground in expressing doubt whether Ireland ought to continue to be viewed comparatively as a leader in this area of the law.<sup>57</sup>

In reflecting upon horizontality and how it is faring in Ireland across the board this article is inclined to hold the view that the judiciary’s comments have been even or at least not hostile. This evenness or lack of hostility is cause for optimism since the discussion on horizontality was in the first place made a reality, and was driven, by judicial activism.<sup>58</sup> Similarly, the tone of academic commentary on the judiciary’s use of horizontality has generally been balanced.<sup>59</sup> Indeed, on balance, academics appear to share the view that the use of rights in private law is a progressive idea and a good tool to have in order to check the excesses of private conduct. Although it is now over 50 years since horizontality made its first appearance on Ireland’s legal landscape there is, curiously, also agreement that the doctrine of horizontality has not matured but retains the status of a neglected but gifted child with huge potential that is seeking to be released. In the next section the Irish judiciary’s pronouncements on horizontality will be examined.

#### *Addressing Inconsistency in Judicial and Academic Discourse on Approaches to Horizontality in Ireland*

In this section a discussion of the approaches to the doctrine of horizontality that Irish Courts apply to private relationships will be made and it will be suggested that scholarly commentary and the actual conduct of courts as regards the options open to the courts so far is problematic on two bases. Scholarly work on the doctrine suggests that the Irish courts, having failed to come up with a coherent framework for the use of direct horizontality, have sought to abandon or suspend this approach and simultaneously or alternatively asked litigants to establish a high threshold of qualification before they will intervene. This thesis is advanced on the basis of an

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<sup>56</sup> Human Rights Commission’s Strategic Plan 2007 to 2011 <available at [http://www.ihrc.ie/fileupload/downloads/IHRC\\_ENGLISH.pdf](http://www.ihrc.ie/fileupload/downloads/IHRC_ENGLISH.pdf) > (last accessed 25 May 2009)

<sup>57</sup> Colm O’Cinneide, *Irish Constitutional Law*, note 1, 251

<sup>58</sup> In South Africa and Malawi for example the Constitution has provisions that expressly empower courts to apply human rights horizontally. See Sibon Banda, *Constitutional Mimicry and Common Law Reform in a Rights-Based Post-Colonial Setting: The Case of South Africa and Malawi*, 2009, 53(1) *Journal of African Law*, 142-170; See also David Gwynn Morgan, note 39.

<sup>59</sup> McMahon and Binchy, note 1; Colm O’Cinneide, *Irish Constitutional Law* and Colm O’Cinneide, *Taking Horizontal Effect Seriously*, note 1. Martin B. Margulies (2002) note 51 Michael Forde note 42, James Casey, *Constitutional Law in Ireland*, (3<sup>rd</sup> edition, Sweet & Maxwell, 2000); Hogan and Whyte, note 12 and Hogan and Whyte, note 13.



interpretation of Henchy J in *Hanrahan* where he stated that courts will intervene on the basis of horizontality only where there has been “*failure to implement*” constitutional rights or where the execution of constitutional rights through the common law was “*plainly inadequate*”. The article will urge an alternative reading of Henchy J. A related and established point is that Irish courts are questioned for invariably meting out judgments on the basis of direct horizontality.<sup>60</sup> It ought to be pointed out that choice of approach here may be dictated by factors beyond the control of the court. Nonetheless, a point is well made that the invariable use of direct horizontality may effectively drown out other more suitable (in cases) approaches.

Secondly, it will be contended that both courts and scholars have contributed to conflating direct and indirect horizontality and to making the distinction between them unnecessarily subtle. It is clear that in spite of throwing up suggestive hints on the distinction between direct and indirect horizontality Irish courts have not put the latter into practice nor have they elaborated on the standard which they identified as necessary for bringing indirect horizontality into operation in a concrete situation. Similarly, scholars of horizontality have been complicit in the conflation. The argument that courts require a high threshold is justified on the ground that Henchy J used the phrases “*plainly inadequate*” and “*basically inadequate*” which he identified as a condition precedent before courts will intervene.<sup>61</sup> An attempt will be made to show how this conflation has come about. In the process direct will be distinguished clearly from indirect horizontality as conceptualised by Irish courts and it will also be asserted that such a conceptualisation is compatible with conventional understanding. It will essentially be argued that the judicial love affair with direct horizontality has not fizzled out whereas, in spite of an explicit indication of intent, the love affair with indirect horizontality has never been given the opportunity to blossom even though the judiciary has given encouraging signs as exemplified by the judgment of Henchy J in *Hanrahan*.

The article will proceed to discuss judicial pronouncements in order to identify assertions of direct horizontality and thereafter will examine such pronouncements

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<sup>60</sup> Colm O’Cinneide, Irish Constitutional Law and Colm O’Cinneide, Taking Horizontal Effect Seriously, note 1;

<sup>61</sup> Ibid, note 1; McMahon & Binchy, note 1, para 1.19 envisage a situation where a court will interpret private law as not “basically ineffective” thus preventing them from intervening and yet perceive the same private law “as less than fully effective”.; and whereas William Binchy, note 1, 201, 208 suggests in “relation to basic ineffectiveness” that the role Henchy J clearly envisaged for courts “was that of filling gaps in private law”.

with the aim of discovering judicial postulations of indirect horizontality in the light of conventional international understanding of indirect horizontality. Before proceeding to discuss these matters the oft cited extract from the judgment of Henchy J in *Hanrahan* which attempts to succinctly summarize the law on horizontality in Ireland will be reproduced

So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only *when there has been a failure to implement or, where the implementation relied on is plainly inadequate*, to effectuate the constitutional guarantee in question. In many torts – for example, negligence, defamation, trespass to person or property – a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskeil v C.I.E.* IR 121); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is *basically ineffective* to protect his constitutional right. But that is not alleged here.<sup>62</sup>

#### *Direct Horizontality: Bringing Clarity to an Irish Perspective*

Speculative scholarly interpretations of the passage by Henchy J have generally portrayed it as symbolic of the judiciary's disenchantment with horizontality or aspects of it.<sup>63</sup> An implication of this interpretation is that judicial practice has rowed back from the gains that apparently were attained before the late 1980s. The courts are thus described as having failed to come up with a coherent framework for horizontality which is understood as the replacement of existing regimes of statutory and common law which regulate relevant areas of private law. As a consequence of this failure courts are described as seeking to abandon or suspend horizontality and to simultaneously require litigants to satisfy a high threshold of qualification before they will intervene on the basis of horizontality. This has been referred to as an “*extra-ordinary volte face*” on the part of the courts.<sup>64</sup> A necessary implication of this speculative interpretation is that the high threshold of qualification is either

- (a) required in respect of direct horizontality and that;
- (b) it is linked to the desire of courts to abandon direct horizontality; or

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<sup>62</sup> Note 1, 636 [emphasis added].

<sup>63</sup> McMahon & Binchy, note 1, para 1.81.

<sup>64</sup> Ibid and Colm O'Conneide, *Irish Constitutional Law*, note 1.

(c) required for both direct horizontality and indirect horizontality

It will be argued that the observation of the alleged failure relates to direct horizontality and that it is not necessary for courts to come up with a coherent framework for direct horizontality in the sense suggested. Subsequently, it will be shown that the courts have not asked litigants to attain a high threshold of qualification before they will intervene and that in fact the courts have taken an essentially pragmatic approach to adjudication.

McMahon and Binchy interpret the judgment by Henchy J as a signal that the Supreme Court found unpalatable the task of developing a comprehensive doctrine of direct horizontality. In their view

The courts, having established that the infringement of constitutional rights by the state or by private individuals, warrants a remedy in the *form of damages or an injunction*, have baulked at the prospect of *replacing pre-existing statutory and common law remedies* by a new constitutional remedial regime but they have not repudiated the principle.<sup>65</sup> [emphasis added]

The implication here is that courts would have been required to embark on the unenviable task of developing a different and new body of law parallel to statutory law and the common law.<sup>66</sup> This construction raises several points. First, Irish courts have not expressed a view prior to or post *Hanrahan* that they intended to replace “pre-existing statutory and common law remedies by a new constitutional remedial regime” as contended. The suggestion of “replacing pre-existing statutory” regimes requires to be examined carefully. If it is accepted that that the approach to direct horizontality demonstrated by Irish courts corresponds to international approaches to horizontality then the question of the possible “replacing of pre-existing statutory and common law” regimes does not arise at all. A premise of horizontality is the absence of legislation or the presence of inadequate common law. Inherent in horizontality is a fundamental respect for the primacy of legislation; assuming it does not itself infringe a constitutional right.<sup>67</sup> Thus where legislation exists to regulate private relations courts have no authority to override it on the basis of direct horizontality. Secondly, direct horizontality as conventionally understood internationally does not require the

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<sup>65</sup> McMahon & Binchy, note 1, para 1.60.

<sup>66</sup> William Binchy, note 1, at 201. A point is made that the task was difficult because the courts had to deal with conceptual, normative and jurisdictional questions.

<sup>67</sup> The question of the presence of inadequate common law is dealt with below in the discussion on indirect horizontality.

replacement of common law remedies. As Johan van der Walt explains direct horizontality operates only where “a claimant was unable to find a cause of action in terms of the existing law”.<sup>68</sup> Thirdly, the construction overlooks the fact that in the period prior to *Hanrahan* Irish courts were called upon to use and did use horizontality only in situations that fit the description of direct horizontality as given by Benson, Young and van der Walt.<sup>69</sup> These points have an important implication and collectively raise doubt about the accuracy of the suggestion that courts intended to replace statute or common law.

As pointed out McMahon and Binchy and O’Cinneide assert that courts, on account of Henchy J, have sought to abandon or suspend direct horizontality and deliberately and simultaneously have chosen to toughen the bases for intervention. It is proposed that the statement of Henchy J be read differently. In order to appreciate this assertion the key phrases in the statement by Henchy J in *Hanrahan* must be looked at again. Henchy J stated that courts will intervene only “where there is ‘*failure to implement*’ constitutional requirements” or “where implementation is ‘*plainly inadequate*’ to effectuate the constitutional guarantee”. It is necessary to deconstruct these expressions and to precisely work out the circumstances they can be invoked and subsequently to relate these circumstances to the argument contended by McMahon and Binchy and O’Cinneide. These two phrases represent the distinction between direct and indirect horizontality in its most basic form. “*Failure to implement*” constitutional edicts is the basis for intervention through direct horizontality whereas the execution of rights that is “*plainly inadequate*” is the basis for intervention on the basis of indirect horizontality. Therefore, as opposed to abandoning direct horizontality the courts have in fact reinforced it. Furthermore, it will be contended that the suggested high qualification is in fact indirect horizontality, separate and distinct from direct horizontality.

In order to understand the context of the phrase “*failure to implement*” we need to consider at least three things. First, the phrase “*failure to implement*” the Constitution in Henchy’s J statement must be read as qualified and explained by a subsequent sentence in the statement

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<sup>68</sup> Johan van der Walt, note 5, 352.

<sup>69</sup> Peter Benson, note 4, Johan van der Walt *ibid* and Alison L. Young, note 3.

a person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskeil v C.I.E.* IR 121)<sup>70</sup>

Secondly, it is necessary to recall the discussion above on the duty the state has to discharge its constitutional obligations imposed by constitutional rights. An argument was advanced there that the acknowledgement of the existence of a judicial space for the implementation of constitutional rights under the doctrine of the state's obligation to discharge constitutional rights is a *sine qua non* for the operation of the doctrine of horizontality. Thirdly, one can further appreciate the phrase by putting it in the context of Costello's J statement in *W. v Ireland (NO.2)* where he distinguished constitutional rights as falling into two categories.<sup>71</sup> In his view constitutional rights may be placed in two categories

(a) those which, independently of the Constitution, are regulated and protected by law (common law and/or statutory law) and (b) those that are not so regulated and protected.<sup>72</sup>

For those rights in the former category they operate through legislation and the common law which provide the framework through which Constitutional rights are protected. He said

In this country there exists a large and complex body of laws which regulate the exercise and enjoyment of these basic rights, protects them against attack and provides compensation for their wrongful infringement ... examples include ... The right to private property [and] the right to bodily integrity ...<sup>73</sup>

In contradistinction, rights in the latter category have not yet been operationalised, and although the Constitution "guarantees their exercise and enjoyment", there is no statute or common law available to regulate their use or "prohibit an anticipated infringement or to compensate for a past one".<sup>74</sup> Presumably the state through the legislature would bear the burden of ensuring that a mechanism is put in place to regulate their use or "prohibition of their infringement and the provision of redress in the event of infringement." So the rationale, among others, for this categorisation is that it enabled Costello J to assess, from the perspective of

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<sup>70</sup> Note 1, 636

<sup>71</sup> [1997] 2 IR 141

<sup>72</sup> Ibid, 164

<sup>73</sup> Ibid, 164

<sup>74</sup> Ibid, 165

fundamental rights, whether such legislative mechanisms were in place to operationalise constitutional rights or whether there was a failure to implement constitutional rights in the positive law of tort which in turn impacted adversely on the particular circumstances of the plaintiff. In the event of absence of legislation or the common law, a judge would be entitled to create a new rule, principle or method in order to fill a gap in the law where necessary. Thus failure to implement in the view of Henchy J would imply a situation where rights have not yet been operationalised. In this type of situation there is no statute or common law available to regulate their use or “prohibit an anticipated infringement or to compensate for a past one”.<sup>75</sup> Consequently, the onus would lie on the state to operationalise the framework for regulation.

Individually and collectively the three points reinforce the understanding of the phrase “*failure to implement*” to mean the absence of a statutory and common law regulatory framework. Therefore, the thesis here is that Henchy J far from signalling disenchantment and the desire to abandon or suspend direct horizontality, emphasised and entrenched direct horizontality in Ireland’s constitutional jurisprudence. Furthermore, and as a necessary implication of this, the phrase “*failure to implement*” suggests an approach unique and separate from indirect horizontality as represented by the phrase “*plainly inadequate*”. Consequently, the question of Irish courts seeking the establishment of a higher than normal threshold in relation to direct horizontality does not arise at all.

In a sense, it is perhaps to be expected that judgments will invariably be based on direct horizontality in that it is unreasonable to expect courts to discuss horizontality in all its aspects in the abstract. Ireland has an adversarial judicial system and thus courts act when substantive legal issues are placed before them in concrete form. Courts can only deal with matters that are brought before them and the corresponding burden of instituting legal proceedings and setting the agenda for the court lies with the Bar. As a result, courts will only discuss the alternative approach of indirect horizontality and give detailed views or guidelines on it so long as they are asked to consider indirect horizontality in a concrete factual situation. An assumption may therefore rightly be made that the depth and breadth of discussion a court invests

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<sup>75</sup> Ibid.

on any given case will to some significant extent depend on the rigour and robustness of research that advocates submit before the court.

Alternatively members of the Bar may reasonably feel that actions based on indirect horizontality will not succeed at all. On this account, some practitioners may opt to frame court actions on the basis of direct horizontality and thus seek safer ways of attaining the desired result for their clients.<sup>76</sup> However, this is different from suggesting that courts in Ireland will not accept arguments based on indirect horizontality.

### *Indirect Horizontality: An Established but Neglected Approach in Irish Law*

O’Cinneide has made a couple of observations in relation to indirect horizontality. First, that courts in Ireland have not opened up or opened up fully to the alternative approach of indirect horizontality and any potential attempt to persuade the courts to use it faces “the conservative approach to existing common law that has been adopted by the Supreme Court”.<sup>77</sup> A consequence of this lack of openness, it is argued, is a stale jurisprudence that does not comport with constitutional requirements nor is it sensitive to the needs of individuals in private relationships.<sup>78</sup> Secondly, that in Irish law there “is little sign of indirect horizontal effect being evidenced in the evolution of private law remedies”.<sup>79</sup> While the latter view may be justified the former may not because courts in Ireland have certainly opened up to indirect horizontality. As noted the judgment by Henchy J in *Hanrahan* stipulates that intervention can be made by courts on the basis of indirect horizontality – where it is established that there is “*plainly inadequate*” in private law.

In order to appreciate that Irish courts have acknowledged the role of indirect horizontality on Ireland’s legal landscape and also to appreciate that “*plain inadequacy*” is equivalent to indirect horizontality two points may be emphasised. First, the phrase “*plainly inadequate*” must be read in conjunction with the following observation Henchy J made several sentences later in the passage which in fact is a classic description of indirect horizontality

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<sup>76</sup> Since I do not have empirical evidence I am assuming that actions were framed on the basis of direct horizontality.

<sup>77</sup> Colm O’Cinneide, Taking Horizontal Effect Seriously, note 1, 90.

<sup>78</sup> Ibid and Colm O’Cinneide, Irish Constitutional Law, note 1,

<sup>79</sup> Colm O’Cinneide, Irish Constitutional Law, *ibid*, 243.

[B]ut when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is *basically ineffective* to protect his constitutional right. But that is not alleged here.<sup>80</sup> [Emphasis added]

Secondly, the argument that courts have unreservedly opened up to indirect horizontality may indirectly be reinforced by the endorsement of Henchy J by Costello J in *W v Ireland (NO. 2)*.<sup>81</sup> Indeed McMahon and Binchy note that the courts after having found the task of dealing with the implications of choosing direct horizontality unpalatable

Instead ...have sought to mitigate its practical effects by looking to the pre-existing law as the medium through which the constitutional remedy should be channelled in most cases.<sup>82</sup>

The next logical question then would be why has indirect horizontality not been an active feature in the shaping of private common law on the legal landscape of Ireland? First this is an issue that can be addressed by the practical endeavours of the Bar and the scholarly efforts of lawyers. Commenting on a similar situation in the South African context Christopher Roederer explains

The question whether the common law and its development comport with the values of the Bill of Rights is a thorny and contentious one. Without the aid of good advocacy it is understandably difficult for judges in the High Court and Supreme Court of Appeal to address the issue adequately (particularly given their heavy case load, the conventions of an adversarial system and the fact that they do not have their own researchers). Nonetheless, the duty ... remains.<sup>83</sup>

In the Irish context research by the Irish Council for Civil Liberties makes similar general observations as regards the limitations that judges face and that these realities impact adversely on judicial activity in general.<sup>84</sup> Consequently good and informed advocacy is a *sine qua non* for the development of a vibrant and effective

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<sup>80</sup> Note 1, 636. The phrase “basically ineffective” is here understood as similar to “plainly inadequate”.

<sup>81</sup> Note 71, 167 and 168

<sup>82</sup> McMahon & Binchy, note 1, para 1.60

<sup>83</sup> Christopher Roederer, *The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy*, 37 *Columbia Human Rights L. R.*, (2006) 447, note 263 quotes C. J. Roederer, *Law of Delict*, in 2000 *Annual Survey of South African Law*, 281, 282. It has of course to be acknowledged clearly that the members of the Bar do not dictate or determine the nature of the case clients bring along to them.

<sup>84</sup> Irish Council for Civil Liberties (Tanya Ward), *Justice Matters: Independence Accountability and the Irish Judiciary*, 2007, available at <<http://www.iccl.ie/publications/Justice/ICCL%20Justice%20Matters%202007%20part%201.pdf>> (accessed 12 May 2007)



indirect horizontal approach. As asserted, progress on this will ultimately depend on fruitful interaction between the strong publics (the courts and the bar) and weak publics (legal scholars).<sup>85</sup> It is only by having a well informed strong publics that indirect horizontality will have a visible impact on positive common law.

Secondly, regarding the argument that indirect horizontality is not actively pursued, it is submitted that this can in part be explained by the conflation of direct and indirect horizontality through the making of the distinction between the two approaches subtle. Furthermore, this conflation emanates from both judicial and scholarly efforts. The Supreme Court has clearly stated in *Hanrahan* that it would use horizontality where it is established that there is “*failure to implement*” or where there is “*plainly inadequate*”. The observation about conflation and unnecessary subtlety can again be properly appreciated in the context of the court’s discussion of these key phrases as condition precedents which will prompt a court to engage into intervention mode on the basis of horizontality. Unfortunately, it is in the elaboration of these phrases that conflation has occurred.

While there is recognition that horizontality has two strands in its most basic form, direct and indirect, it seems that there has been an omission to clearly and unambiguously relate these strands to the key phrases in the statement by Henchy J. Thus, “*plainly inadequate*” must be clearly linked to indirect horizontality and must be understood as the basis for court intervention in an existing private law situation.

At the very least, courts have not explained indirect horizontality to the same extent as direct horizontality and have also not made explicit the link and the distinction between direct and indirect horizontality. The remarks of Costello J in the case of *W. v Ireland (NO.2)* are an example of failure to link “*plainly inadequate*” to indirect horizontality. Costello J omitted to point out expressly in his taxonomy that private common law regimes may be a source of infringement hence the need for indirect horizontality.<sup>86</sup> Similarly, courts have not made any serious attempt to explain the circumstances where courts will intervene on account of inadequacy in the

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<sup>85</sup> See Nancy Frazer, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, in Craig Calhoun (ed.) *Habermas and the Public Sphere*, (MIT Press, 1992), 109- 142 and *Justice Interruptus: Critical Reflections on the “post-Socialist” Condition*, Routledge, 1997, p. 90 for a discussion of the practical usefulness of the concepts of weak and strong publics. Weak publics are understood as fora or sites in society where opinion making is generated and discussion is had but nonetheless do not have binding decision making powers. Strong publics on the one hand are fora or sites in society which engage in both opinion making as well as concrete decision-making which impacts on real lives.

<sup>86</sup> McMahon & Binchy, note 1, para 1.70

common law regime. What appears to be missing is an attempt to produce guiding principles. An example of failure to elaborate clearly circumstances indirect horizontality will apply as opposed to direct horizontality is provided by the remarks of Costello J in *Phillip Hosford*.<sup>87</sup> Equally, in this case Costello J does not allude to the possibility that private common law rules may themselves be the source of infringement. In such a situation a constitutional right through indirect horizontality would shape or modify the common law rule so that it conforms to constitutional requirements. Costello J acknowledges the non-availability of damages at common law in the case but from a remedial point of view appears to only focus on explaining the circumstances direct horizontality can be invoked. In other words, indirect horizontality may equally be invoked in similar circumstances.

Moreover, it appears that scholarly endeavour may possibly be complicit in the conflation of direct with indirect horizontality and also in contributing to the lack of profile of indirect horizontality.<sup>88</sup> Anecdotally, scholars have projected the view that courts will generally not want to interfere with private law in its regulatory functions on the basis of human rights.<sup>89</sup> The premise of this view is that although private law has some limitations in that its prescriptions may breach the common sense of justice it is nevertheless the best tool for regulating private relations. Consequently, a legal strategy that attacks private law will succeed only in very “exceptional circumstances” which appear to be understood as “rare circumstances”. In other words, “*plainly inadequate*” and “*basically ineffective*” are construed as corresponding to “*rare circumstances*”. The cases of *Hanrahan, W v Ireland* and *McDonnell v Ireland* are thus cited to reinforce this perspective and interestingly to support the view that they are representative of current judicial discourse on horizontality. Colm O’Cinneide clearly building on this perspective notes

Well established private law rules, whether common law or legislative in origin are presumed to be consistent with constitutional norms: Only in *exceptional circumstances* will they be subject to constitutional scrutiny, and horizontal effect will only come into play where the

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<sup>87</sup> Note 11, 303. See Costello’s remarks quoted at note 26.

<sup>88</sup> With the exception of Binchy, note 1.

<sup>89</sup> On the basis of anecdotal evidence it would seem to that this view is particularly entrenched and that this reluctance is a feature across the board on the Irish legal landscape. Gerry Whyte, note 40 reinforces this observation and notes that the “view that our [Irish] Constitution sets its face against judicial activism of this nature is so ingrained among many sections of the legal profession”. D.G. Morgan note 39 (on judicial activism) and the very existence of horizontality suggest a more nuanced view ought to be held.

existing private law is clearly and manifestly out of line with the constitution.<sup>90</sup> [Emphasis added]

Thus post *Hanrahan* the implication communicated is that, first, after rowing back from the earlier gains prior to the 1990s

The Irish courts have showed greater caution in applying constitutional rights in the private sphere, where existing private law clearly regulates a matter within the scope of application of a constitutional right.<sup>91</sup>

Secondly, that the basis for intervention has been toughened by requiring litigants to satisfy a higher than normal threshold, “*plainly inadequate*”, in order to convince the courts to act on the basis of horizontality

In general, the Irish courts tend to adopt an approach based upon deference towards existing private law positions, which *Hanrahan* reinforces by apparently sealing off well-developed areas of private law from the influence and impact of constitutional norms<sup>92</sup>

However, the picture sketched of the Irish Court’s attitude to indirect horizontality may be challenged in that it conflates direct with indirect horizontality. If the implication of the first point is that indirect horizontality had been used prior to the 1990s, it is submitted that it is inaccurate and confuses the two approaches to horizontality hence the conflation. Irish courts prior to *Hanrahan* did not employ indirect horizontality.<sup>93</sup> Rather it is direct horizontality that courts used. This observation is further reinforced by Henchy J

So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof<sup>94</sup>

On the second point, the construction of the statement by Henchy J in this way suggests that there is no recognition of its nuanced nature. The judgment of Henchy J

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<sup>90</sup> Colm O’Cinneide, Irish Constitutional Law, note 1, 236

<sup>91</sup> Ibid,

<sup>92</sup> Ibid, 243. The judgements in *Hanrahan*, *McDonnell and W v Ireland* are pointed at as evidence of this tendency. Curiously O’Cinneide indicates that he does not necessarily see anything fundamentally wrong with the manner in which the courts have dealt with these cases. Colm O’Cinneide, Irish Constitutional Law, note 1, 236 footnote 93

<sup>93</sup> *Educational Co. of Ireland v Fitzpatrick (N0.2)* [1961] IR 345; *Byrne v Ireland* [1972] IR 241; *Meskeil v C.I.E* [1973] IR 121 and *Murtagh Properties Ltd v Cleary* [1972] IR 330. The exception appears to be *Burke and O’Reilly v Burke and Quail* [1951] IR 216; *Re Blake* [1955] IR 69;

<sup>94</sup> Direct horizontality has been employed where in fact there was no common law or statutory law framework in operation. Costello J in *Phillip Hosford* note 11, 305 illustrates this point.

is taken as a broad statement of intention on the part of the judiciary to toughen the criteria for entertaining claims made on the basis of horizontality-understood as direct horizontality. However, the identification of “*plainly inadequate*” in the existing law is not necessarily intended by Henchy J to be a condition precedent for direct horizontality. Of course it is possible to interpret “*plainly inadequate*” as a condition precedent for direct horizontality in that a court could opt for the development of an independent and elaborate direct horizontality which would run alongside or replace the existing specific common law rule. However, (as argued above) it is submitted this is not the sense in which, Henchy J should be construed nor did he intend to be understood.<sup>95</sup> “*plainly inadequate*” represents an approach in its own right. To put it differently, in situations where private law is well established but nonetheless is in breach of constitutional rights courts have since expressed a preference for indirect horizontality as opposed to direct horizontality as demonstrated by the remarks of the Supreme Court in *Hanrahan* and *McDonnell v Ireland*. It is therefore crucial for the development of the doctrine of horizontality that clarity be brought to bear on the phrases “*failure to implement*” and “*plainly inadequate*” as representing two very different, equally useful and applicable approaches – direct and indirect horizontality.

Similarly, an implication arises that it is in relation to indirect horizontality that a higher than normal threshold is required since “*plainly inadequate*” is in fact indirect horizontality. This line of argument is equally not persuasive. It is merely speculative to suggest that it is established within the judicial ranks that attacks on private law will succeed only in “exceptional” or “rare” circumstances. Henchy J neither passes any value judgment on whether recognition of indirect horizontality is a good thing nor does he give guidelines on the nature or level of the threshold that needs satisfaction. Indeed no value judgment is given by the pronouncement of Henchy J

[I]t might be different if it could be shown that the tort in question is *basically ineffective* to protect his constitutional right<sup>96</sup>

“*plainly inadequate*” or “*basically ineffective*” do not carry any extra-ordinary meaning beyond what they represent in common parlance. As pointed out Henchy J rejected the plaintiffs’ arguments on the basis that the plaintiffs did not exhaust the

<sup>95</sup> The discussion on direct horizontality above has suggested that direct horizontality is not intended to run alongside or to replace the common law.

<sup>96</sup> Note 1, 636

private law options available to them and also that concession of the plaintiffs' argument would be fundamentally unjust to the defendant in the specific circumstances of the case.<sup>97</sup> Alternatively it may be argued that the plaintiff in *Hanrahan* was seeking change in the rules of procedure as opposed to alteration in the substance of tort law. The alleged inadequacy was identified in the rules of evidence as opposed to the substance of tort law. It is, therefore, suggested that it is inappropriate to use *Hanrahan* as evidence of judicial unwillingness to intervene, on the basis of “*plainly inadequate*”, in cases where there is an established private law framework. The passage by Henchy J and its constituent parts indicate nothing else other than the mere statement of ‘*brute facts*’.<sup>98</sup>

Finally, it is clear “*plainly inadequate*” as a term of legal and judicial art has not been epistemically explained by the Irish Courts and inevitably the judgments beg the analytical question as regards indirect horizontality.<sup>99</sup> Similarly Barrington J in *McDonnell v Ireland* and Costello J in *Hosford* fall short of elaborating in cogent abstract terms what adequacy or inadequacy entails.<sup>100</sup> A possible way of resolving this would be to look beyond the Irish jurisdiction – admittedly this requires more discussion than space allows in this instance. The judgment of O'Regan J in *Kern CC* may provide guidance and ground for debate on the meaning of “*plainly inadequate*” as a term of art in legal and judicial circles.<sup>101</sup>

O'Regan specifically addressed the question under what circumstances or when the common law may be altered in the context of the constitutional requirement under section 39 (2) of the South African Constitution<sup>102</sup> and adopted the view of her fellow South African Constitutional Court Judge Moseneke J. expressed in *S v Thebus*

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<sup>97</sup> See discussion on note ...

<sup>98</sup> Eric Barnes, Explaining Brute Facts *PSA: Proceedings of the Biennial Meeting of the Philosophy of Science Association*, Vol. 1994, Volume One: Contributed Papers (1994), 61-68, University of Chicago Press

<sup>99</sup> On the legal significance and the illustration of a term of art in law see *Molzof v. United States*, 502 U.S. 301, 112 S. Ct. 711, 116 L. Ed. 2d 731 (1992). McMahon & Binchy, note 1 and Binchy, note 1 have speculatively put across a possible way of interpreting “*plainly inadequate*” in the context of the words of Henchy J in *Hanrahan*.

<sup>100</sup> In *Hosford* a justification Costello J used was that ‘the common law does not permit recovery of damages for the deprivation of the non-pecuniary benefits which derive from the parent-child relationship’. This is very unsatisfactory since he was dealing with the Constitution and thus his judgment still begs the analytical question.

<sup>101</sup> *Kern CC* note 33.

<sup>102</sup> The Constitution of the Republic of South Africa Act N0. 108 of 1996. S 39 (2) provides “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. For a discussion of the operation on indirect horizontality see Sibon Banda, note 58 and Johan van der Walt, note 5.

*and Another*.<sup>103</sup> A rule of the common law may be altered either when it is inconsistent with a provision of the Constitution or it is consistent with a specific constitutional provision but is nevertheless out of step with the spirit, purport, and objects of the Constitution.<sup>104</sup> Furthermore, O'Regan explained and distinguished the meaning of the “incremental” development of the common law through the principle of precedent.<sup>105</sup> She clarified the “development” of the common law under the Constitution in light of section 39 (2) as: first, the removal of those aspects of the common law that are inconsistent with the Constitution; and, second, the “infusion” of the normative values of the Constitution into an adjudicative process “when some startling new development of the common law was in issue.” She explained that this involved the grafting of such constitutional normative values onto the customary process of incremental development of the common law.<sup>106</sup>

#### *Discourse on Horizontality: Time to Address the Analytical Problem in Judicial Pronouncements*

The cases on the doctrine of horizontality in Ireland do not subject the doctrine to an analysis of an exacting nature. Specifically the courts in these cases did not consider clearly, broadly and deeply in relation to rights, the variety of conceptual approaches, normative requirements and the jurisdictional implications of the doctrine on private legal adjudication. The doctrine demands analytical attention from a potential range of perspectives including the nature of a right, its scope and its efficacy and practicability. The constitution incorporates a variety of rights which potentially demand different treatment along these factorial considerations. Indeed much that is known of the doctrines’ potential reach in Ireland is the result of academic speculation. It is therefore essential that courts begin to give the required clarity on this matter.

A legitimate point may be made that it is not the duty of courts to engage in lofty abstract analysis but to resolve disputes in the most practicable and satisfactory manner possible.<sup>107</sup> In other words, it is to scholars that we should look to and from

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<sup>103</sup> 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28 and *Kern CC* note 33, para 16.

<sup>104</sup> *Kern CC* note 33, para 16.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, para 17.

<sup>107</sup> A less generous view of academics is that academics as opposed to judges appear to have the luxury of time for reflection, the luxury of the knowledge that their ideas and actions will not have immediacy of impact (the burden of responsibility), academics can produce, with a straight face, theories which

whom we ought to expect the performance of this task. While it is correct, for a variety of practical reasons, to suggest that scholars should bear this burden it is persuasive that courts should equally be conversant with developments in legal theory and analysis and should also play a lead role in the development of frameworks for analysis. Judges are appointed to high office on the basis that they are reservoirs of legal knowledge and skill acquired over a lifetime of practice and reflection. Consequently, there is an underlying assumption that judges are familiar with the intricacies of legal theory and its links to practical issues and are assumed to have a steady hand with which they deal with these issues.

It cannot be disputed that courts require a taxonomy which imparts legitimacy on the adjudicative practices of courts. A taxonomy ensures consistency and consistency is an important value in adjudicative practices. For example lawyers assume that an inconsistent pronouncement of legal principles leads to loss of confidence in the judiciary.<sup>108</sup> A taxonomy also make the job of judging easier since it enables judges to locate gaps or inadequacies in the positive law and to identify applicable legal principles and rules. In turn these lead to the determination of appropriate and commonly acceptable forms of redress. Oona Hathaway makes similar observations on stare decisis in her study of path dependence in common law legal circles

Path dependence theory [*read taxonomy*] has relevance for both legal scholarship and legal practice. It guides legal practitioners to concentrate their resources on altering the path of law and it provides a new basis for scholars to question and refine the doctrine of stare decisis which creates the law's path dependent character.<sup>109</sup>

Ultimately progress on horizontality depends on the reaction by the strong publics, the courts and the bar, to discussion and commentary made by weak publics, the academics.<sup>110</sup> Ideas of scholars require to be taken on board by the publics that matter, the strong publics, so that the production of new knowledge by scholars does not become a futile and purposeless exercise.

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others have dubbed “micky mouse theories” on account of their apparent irrelevance to real people. Relatively academics appear to have the resources to put into effect or publicise their ideas with little regard for impact. Judges and advocates cannot avoid responsibility or engage in “trivialities” and they have to account for their actions to real people.

<sup>108</sup> See Lon Fuller, *The Morality of Law*, (Revised ed, Yale University Press, 1964).

<sup>109</sup> Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System* (2001) 86 *Iowa L.R.* 601, 605 [Emphasis added]

<sup>110</sup> See Nancy Frazer, note 85.

Since the early 1990s judges have made attempts to correct the apparent lack of analytical depth in the judgments on horizontality by exacting specific aspects of constitutional rights to abstract analysis. For instance, one can assess the observation made by Costello J. in *W v Ireland (No.2)* as an attempt to analyse the issues of efficacy or practicability of a fundamental right as a question of “judicial choice” of a particular mode or approach to the enforcement of rights.<sup>111</sup> The question of “judicial choice” here indicates that the courts have an option to fashion a remedy through direct horizontality tort or to develop an existing common law tort structure through indirect horizontality.

There are also instances where courts have failed to subject to rigorous and compelling analysis the grounds for their decisions to apply or to refuse to apply constitutional rights horizontally. It is acknowledged however, that this is an area of law that will generate divided opinion – just as virtually any other area of law does. One can identify as lacking analytical clarity the question of the scope of rights in private relationships. Siobhan Mullally observes that Irish courts have dealt unsatisfactorily with the application of principles of constitutional justice to private relationships and points to *Carna Foods Ltd* as a case in point.<sup>112</sup> Margulies questions why the court in *Carna Foods Ltd* did not adopt the basis of the decision in *Glover v B.L.N Ltd*.<sup>113</sup> Similarly, courts appear to adopt a blanket denial as opposed to a nuanced approach to the idea that the equality clause, Article 40.1, has effect in private relationships.<sup>114</sup> Often in liberal democracies the dominant view holds that the scope fundamental rights have is limited by the extent to which they threaten to interfere with an individual’s autonomy.<sup>115</sup> Exceptions, however, may be tolerated in many areas of private law including the right not to be discriminated against.<sup>116</sup> A number of jurisdictions will tolerate encroachment upon an individual’s autonomy

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<sup>111</sup> Note 71.

<sup>112</sup> See Siobhan Mullally, note 49; [1995] 1 IR 526 (HC) as per McCracken J and [1997] 2 ILRM 499 (SC) as per Lynch J.

<sup>113</sup> [1973] IR 388 and Margulies, note 51.

<sup>114</sup> Mullally, note 49. Dissatisfaction is also expressed in relation to the interpretation of the constitutional equality guarantee and critics cite The Constitution Review Group’s recommendation against extending the equality guarantee in Article 40.1 of the Irish Constitution.  
<http://www.constitution.ie/reports/crg.pdf>

<sup>115</sup> Ernest J. Weinrib, *The Idea of Private Law*, (Harvard University Press 1995) and Rick Bigwood, *Contracts by Unfair Advantage: From Exploitation to Transactional Neglect*, (2005) 25 *OJLS* 65.

<sup>116</sup> Paul Rishworth, *Taking Human Rights into the Private Sphere*, in D. Oliver and J. Fedtke (eds), note 1 and Amnon Reichman, *Property Rights, Public Policy and the Limits of the Legal Power to Discriminate*, in D. Friedman & D. Barak-Erez (eds.) note 4.



only to the extent that the transaction in question is animated with a publicly recognised social interest.<sup>117</sup>

Significantly, the pre-1990 Irish cases on horizontality do not outline any or analytically persuasive guidelines by which horizontality may be addressed as in the manner Peter Benson envisaged in writing about courts in Canada

The courts did not devise a classification of the different ways of conceiving the relation between private law and basic human rights<sup>118</sup>

The courts in Ireland have not to date come up with coherent and analytically persuasive explanations of horizontality from conceptual, juridical and jurisdictional perspectives. To borrow from Hogan and Whyte the doctrine of horizontality

Marked – unfortunately from the point of view of one attempting a systematic exposition of an organic law – by a certain blurring of definition, a certain bursting of conceptual banks<sup>119</sup>

The “bursting of conceptual banks”, mirrors the state of praxis and commentary in Ireland pertaining to horizontality. Binchy observes that there is an absence of normative unity and coherence in the judgements meted out.<sup>120</sup> From a scholarly perspective laudable, important and groundbreaking work has previously been done which will make the burden of future work less daunting. Recognition has to be made of the work by McMahon and Binchy; Binchy; Forde, O’Cinneide and Margulies. Special recognition must be made of McMahon and Binchy who have set the pace and made a proactive attempt to suggest ways of developing some coherence.<sup>121</sup> However a lot of work on this still needs to be done and no doubt new problems hitherto unknown will continue to raise their heads. The words of Peter Benson are apposite here

It is not satisfactory merely to collect instances where norms of [human rights] have been applied to private transactions or where individuals have successfully brought claims against others for breach of such norms. The crucial issue is conceptual: how are such claims to be

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<sup>117</sup> Paul Rishworth discusses New Zealand *ibid*; Amnon Reichman and Lorraine E. Weinrib and Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, in D. Friedman & D. Barak-Erez (eds.) *ibid* discuss Canada.

<sup>118</sup> See Peter Benson, note 4, 201

<sup>119</sup> Gerard Hogan and Gerard Whyte, note 13, para 7.3.53. They make this observation in relation to the doctrine of unenumerated constitutional rights.

<sup>120</sup> William Binchy, note 1 at p. 205

<sup>121</sup> *Ibid.* McMahon & Binchy, note 1, paras 1.66-1.70.

conceived? Do they display the fundamental and distinctive character [*of normative (-ness) that private law is claimed to have?*]<sup>122</sup>

### *Conclusion*

As Loraine and Ernest Weinrib observe the nature of private law is a matter of considerable contestation with divisions in perspectives established along the line “between those who see private law non-instrumentally as the juridical realisation of corrective justice and those who see it instrumentally as the vehicle for promoting economic efficiency.”<sup>123</sup> It is submitted that the ideal of justice as personal dignity be added as a further point of departure in this debate particularly in the context of contemporary Irish law and society.

In juridical or normative terms the technical elaboration of the doctrine of horizontality within the legal system – its configuration, prescriptive nature and limitations in relation to the individual’s autonomy – sets the stage for heated debates linked to the division between the public and the private domains of law.

Jurisdictionally, it is significant that the Irish Constitution does not expressly authorise the courts to apply the Fundamental Rights horizontally and that it is the courts which have staked ground for such application. For formalists (literalists) this is a discomforting feature and an example of creeping judicial activism which is ultimately corrosive of the doctrine of separation of powers. Furthermore, there are problems about legitimacy of action that intrudes on individual autonomy as between the legislature and the judiciary.

Conceptually the jurisprudence of horizontality has benefited from the with deep reflection of McMahon and Binchy, Binchy and O’Cinneide in terms of the approaches available to it and the normative circumstances of that give rise to its invocation. As a tentative and preliminary step towards further addressing this I have built upon the work of McMahon and Binchy, Binchy and O’Cinneide and attempted to re-examine the pronouncements made by courts in Ireland on the meaning of horizontality in the Irish legal system and to suggest openness to developments in other jurisdictions. My main argument has been that Ireland in common with a few other jurisdictions uniquely retains both the direct and the indirect approaches to the doctrine of horizontality. It is my contention that this elucidation is merely the easy

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<sup>122</sup> See Peter Benson Benson, note 4, 201 at 202 [Emphasis and bracketed words added]

<sup>123</sup> Lorraine and Ernest Weinrib note 117.

spade work while, as Binchy notes perceptively, the hard work lies ahead in sorting out the conceptual, normative and jurisdictional questions.

A possible way of addressing this is to re-examine past cases on private law and to highlight the opportunities that have been lost regarding the application of rights horizontally. An objective of this approach would be to develop a sophisticated Irish and comparative body of knowledge which the strong publics – advocates and the courts – would tap in to from time to time. This body of knowledge ideally would deepen the understanding of the nature, scope and efficacy of horizontality and lead to the appreciation of the uniqueness, importance and potential advantage the doctrine of horizontality may bring to the legal adjudication of private law in Ireland.